No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER, et al.,
Appellants,

vs.

R. S. MARSHALL, et al.,
Appellees.

BRIEF FOR APPELLANTS.

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FILED
MAR 11 1925
F. D. MONCKTON,
CLERK

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BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The appeal herein is one taken from a decree entered January 24, 1924, dismissing an amended bill of complaint on two grounds:

1. That the judgment in a certain action in the Superior Court of the State of California "is a prior adjudication of the cause of action in this suit and is a bar to the prosecution of this suit;" and
2. "That the bill of complaint herein lacks equity and should be * * * dismissed as to all the defendants herein." (Tr. p. 32.)

To the amended bill of complaint there was interposed the answer of Daniel A. McColgan (since deceased and now represented by Adelaide McColgan as administratrix with will annexed), R. McColgan

and Eustace Cullinan (Tr. 3964, p. 26),* and also the answer of the remaining appellees. (Tr. p. 2.)

The answer of Daniel A. McColgan, Reginald McColgan and Eustace Cullinan set up numerous defenses including that of "former adjudication" (Tr. 3964, p. 57), in an action numbered 5353 in the Superior Court of the State of California in and for the County of Stanislaus, and that of "another action pending" (Tr. 3964, p. 61) numbered 5433 in the same Superior Court.

The cause came on for trial January 8, 1924, at which time the last mentioned defendants sought leave to file a supplemental answer showing that the judgment in the "action pending" had been affirmed on appeal and become final. Leave was denied upon stipulation that they might nevertheless prove all facts which they could prove if the supplemental answer were actually filed. In effect, therefore, the court had before it two pleas of *res judicata* interposed on behalf of Daniel A. McColgan, R. McColgan and Eustace Cullinan.

No such pleas, however, were made on the behalf of the remaining defendants, nor were any motions to dismiss the amended bill of complaint for lack

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* On October 13, 1924, this court ordered that the amended bill of complaint and exhibits thereto, and the answer of D. A. McColgan, R. Colgan and Eustace Cullinan and exhibits thereto, which were printed, filed and docketed in this court on a former appeal herein, numbered 3964, and which appear on pages 2 to 139, inclusive, of the transcript of record on file therein, might be considered, referred to and used as if it were printed in the transcript of record on this appeal. (Tr. p. 56.)

Hence reference herein made to the transcript on the former appeal are made thus: (Tr. 3964 p.....); and references to the transcript actually printed and filed on this appeal are made thus (Tr. p. ...).

of equity interposed on behalf of any of the appellees.

The cause came on for hearing on January 8, 1924, at which time the court proceeded to try the two pleas of *res judicata* made only by the defendants D. A. McColgan, R. McColgan and Eustace Cullinan. The evidence introduced both in support of the plea and against it consisted wholly of written instruments. Thereafter the cause was ordered submitted for decision solely on the pleas in bar, with the result indicated.

The only questions arising upon this appeal are these:

1. Did the District Court err in determining that the judgment in action No. 5344 constituted a prior adjudication of the issues raised by the amended bill of complaint herein and thus that it barred the provisions of this suit

(a) against the appellees Daniel A. McColgan, Reginald McColgan, and Eustace Cullinan, who alone interposed the plea of *res judicata,* and

(b) against the remaining appellees, who did not plead it.

2. Did the District Court err in dismissing the bill for lack of equity, particularly in view of the facts, first, that no motion to dismiss on such ground or on any other ground were ever made, and second, that no hearing on the merits was ever had.

The questions raised and stated above are fully included within the specification of error which is as follows:

SPECIFICATION OF ERRORS.

I.

The court erred in holding that the judgment in that certain action in the Superior Court of the State of California, in and for the County of Stanislaus, and therein numbered 5344 on the records of said court wherein Fred V. Lineker was plaintiff and Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, were defendants, was or is a bar to the prosecution of this action.

II.

The court erred in holding that the bill of complaint herein lacks equity.

III.

The court erred in holding that the bill of complaint herein should be dismissed.

IV.

The court erred in entering its judgment and decree dismissing the said bill of complaint. (Tr. p. 44.)

THE ARGUMENT.

A topical outline of the argument of the points of fact and law is as follows:

I. Nature and content of amended bill of complaint.

II. Nature of Superior Court Action No. 5353 and of judgment therein.

  A. Action 5353 and judgment therein not a bar to this proceeding.

  B. Effect of Action 5353 and judgment therein as a bar not involved on this appeal.

III. Nature and effect of Superior Court Action No. 5344.

  A. Nature and content of complaint in Action No. 5344.

  B. Nature and content of answer in Action No. 5344.

  C. Nature and scope of findings and judgment of Superior Court in Action No. 5344.

  D. The points of fact and law actually in issue in Action No. 5344 in the Superior Court and in the District Court of Appeal.

IV. The bill was improperly dismissed on the ground of lack of equity.

V. The Law.

  A. It was legally impossible for Daniel A. McColgan to have acquired an equity of redemption or any other estate or interest in the land by reason of his purchase of the Crittendon certificate of sale that sur-

vived the sale by the trustee under the original deed of trust.

B. The modern doctrine of *res judicata* prevents the operation of the bar in this case.

I.

NATURE AND CONTENT OF AMENDED BILL OF COMPLAINT.

The amended bill herein alleges in addition to the jurisdictional facts concerning citizenship, legal capacity and amount involved, substantially as follows:

Norvena Lineker (now deceased) was the owner of certain real estate in Stanislaus County, California. On June 20, 1910, she conveyed this property by deed of trust to Reginald McColgan to secure payment of her note in favor of Daniel McColgan for $2850.00 and any further sums which she might borrow from him, or which he might advance "for her use and benefit, and also any liens and encumbrances against said real property which said Daniel A. McColgan or R. McColgan, or both of them might properly pay or discharge * * *"; but the amount of the loan instead of being $2850 was in reality only $2500.00. (Tr. 3964, p. 5.)

On September 22, 1912, Norvena Lineker and the appellant, Frederick V. Lineker were intermarried and on August 18, 1913, Norvena

> "made an instrument in the form of a deed of said property to her husband Frederick V. Lineker, so that he might be in a better position to assist her in protecting her interest in the above described property; that there was no consideration given or received for the making of said instrument; * * *". (Tr. 3964, p. 4.)

On or about September 2, 1914, R. McColgan as trustee, sold or attempted to sell to appellee R. S. Marshall the property covered by the deed of trust, Prior to the sale, Daniel A. McColgan and R. McColgan, "unlawfully and fraudulently claimed that they were entitled under said deed of trust to a sum greatly in excess of the $2500.00 so advanced by said McColgan" (Tr. 3964, p. 5) together with interest thereon, and all other sums which fell due under the terms of the deed of trust. They falsely and fraudulently claimed that they were entitled to $10,000.00 and made the threat to Lineker that if he did not turn over the sum of $10,000.00 to them before September 2, 1914, they would cause the property to be sold and thereby bring it about that both the Linekers would lose all their interest therein. In order to protect their interest, the Linekers procured one Annie Connors to advance $13,000.00 upon the security of the property and the Linekers were prepared to purchase the property for that amount at the sale which was noticed for September 2, 1914. (Tr. 3964, p. 6.) Shortly prior to the sale the two McColgans advised Lineker that he should bid at least $14,000.00 for the property;

> "that it would make little or no real difference in the final settlement of the account between the plaintiffs and Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for said property for the reason that the plaintiffs would only have to pay to the defendants Daniel A. McColgan and R. McColgan what was justly due under said deed of trust dated June 20th, 1910, and that all sums in excess of such amount for which the property might be sold would be accounted for to the said plaintiffs by the said defendants Daniel A. McColgan and R. McColgan, and turned over to the plaintiff by said defendant R. McColgan." (Tr. 3964, p. 7.)

On the day set for the sale, an attorney representing Annie Connors suggested that the interest of all parties would be best conserved by having some third person bid in the property as trustees for the plaintiffs. The McColgans agreed to this plan and urged Lineker to permit the sale to be made to R. S. Marshall. The Linekers

> "being inexperienced in business matters and particularly to matters relating to the transfer and sale or encumbering of real property and relying upon the advice and counsel of the defendants Daniel A. McColgan and R. McColgan, consented that the property be bought by said R. F. Marshall as trustee for the said plaintiff Frederick V. Lineker;"

and accordingly the property was sold by R. McColgan to Marshall as trustee and agent for Lineker for $14,000.00. (Tr. 3964, p. 7.)

Thereupon Marshall and his wife, Olive H. Marshall, gave their promissory note to Annie Connors

for $13,000.00, executed a deed of trust in her favor to M. J. Connors and B. M. Lyons, received the sum of $13,000.00 and paid it over to R. McColgan as trustee. (Tr. 3964, p. 8.)

September 3, 1914, Frederick V. Lineker and R. S. Marshall entered into a certain agreement reciting Marshall's purchase of the property, his giving of the note of $13,000.00 to Annie Connors and a note for $2455.00 to Daniel A. McColgan. It was agreed that the property was to be surveyed, subdivided and sold by Marshall upon certain terms therein set forth, after payment of indebtedness, taxes, assessments, etc. (Tr. 3964, p. 8.)

> "That on said 2nd day of September, 1914, without any real consideration whatever, passing from the said R. McColgan or Daniel A. McColgan to the plaintiff herein, or to said R. S. Marshall, the said R. S. Marshall and his wife, Olive H. Marshall, wrongfully and unlawfully and in fraud of the plaintiffs' rights herein made or attempted to make a certain deed of trust to defendants R. McColgan and Eustace Cullinan, as trustees for the defendant, Daniel A. McColgan, for the sum of $2445.00 or thereabouts." (Tr. 3964, p. 11.)

On January 22, 1917, R. McColgan and Eustace Cullinan sold or attempted to sell the property under the last mentioned deed of trust to E. C. Peck, who afterwards conveyed to T. K. Beard, who, together with his wife, thereafter conveyed a one-half interest to Marshall. (Tr. 3964, p. 11.)

Beard and wife and Marshall and his wife, on March 4, 1918, gave their note for $15,000.00 to Union Savings Bank of Modesto and secured it by a deed of trust to the Stanislaus Land & Abstract Company, as trustees, and "the defendants T. K. Beard and R. S. Marshall now claim to be the owners in fee simple absolute of said real property" subject only to the deed of trust to the Stanislaus Land & Abstract Company. (Tr. 3964, p. 11.)

> "The plaintiffs allege that said pretended deed of trust made by the defendants, R. S. Marshall and his wife Olive H. Marshall to R. McColgan and Eustace Cullinan as trustees for the defendant Daniel A. McColgan, was made without any consideration therefor, and for the purpose of obtaining for the defendants, Daniel A. McColgan and R. McColgan, an unconscionable and illegal advantage of plaintiffs and of wrongfully obtaining more than was due from the plaintiffs to the defendant, Daniel A. McColgan." (Tr. 3496, p. 12.)

> "That each and all other transfers and attempted transfers of said property and all dealings therewith by any of the defendants, subsequent to the said 2nd day of September, 1914, were made without the plaintiffs' consent and were made without any consideration passing to the plaintiffs or either of them and are void and illegal." (Tr. 3496, p. 12.)

The sum of $13,000.00 received from Annie Connors and paid over to the McColgans "was greatly in excess of all moneys due or owing to them from the plaintiffs or either of them". (Tr. 3496, p. 13.)

The second deed of trust securing the note for $2455.00 made by Marshall and his wife to R. McColgan and Cullinan, as trustees for Daniel A. McColgan

> "was without any consideration and void as against these plaintiffs and that all attempted conveyances and all charges against said land under said deed of trust are void, illegal and made without any consideration moving to these plaintiffs or either of them, and that any and all conveyances attempted to be made by said R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan under said alleged deed of trust dated September 2nd, 1914 (to secure note for $2455.00), are void and of no virtue as against these plaintiffs or either of them and that the attempted conveyance hereinbefore mentioned and described"

by McColgan and Cullinan to Peck, from Peck to Beard and from Beard and wife to R. S. Marshall,

> "are and each of them is unlawful and void of any effect as against these plaintiffs or either of them." (Tr. 3964, p. 13.)

Neither of the McColgans have ever paid to the plaintiffs any part of the sum of $13,000.00, nor have they accounted to the plaintiff for any part thereof. (Tr. 3964, p. 14.)

The relief prayed for was that the second deed of trust, securing the note for $2455.00 be declared null and void, and all subsequent transfers of the property be declared null and void; that the plaintiffs be declared and adjudged the lawful owners of the property,

> "that account be taken of the loan made by Daniel A. McColgan to the plaintiff Norvena Lineker on or about the 20th day of June, 1910, and all moneys paid thereunder, and account of all sums of money that have been received by the defendants, Daniel A. McColgan and R. McColgan for the account thereof, and from any and all sales of said real property be taken, and that the amount justly owing to the plaintiff thereunder be ascertained and declared."

That an account be taken of all moneys received by R. S. Marshall as trustee for Lineker and any balance found due on such accounting be ordered paid to plaintiff, and that the defendants be compelled to reconvey the property to the plaintiff. (Tr. 3964, p. 14.)

II.

NATURE OF SUPERIOR COURT ACTION NO. 5353 AND OF THE JUDGMENT THEREIN.

To this amended bill of complaint, the defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan, pleaded a former adjudication in an action in the Superior Court of Stanislaus County, No. 5353 in the files thereof. It appears from the answer that this action was instituted by R. S. Marshall and Olive H. Marshall, and that Marshall, in the language of the answer of the defendants in that action, the McColgans and Cullinan, was "the agent, trustee, representative and privy of said Frederick V. Lineker and Norvena E.

Lineker." The defendants in this action were Daniel A. McColgan, R. McColgan and Eustace Cullinan. The action was commenced December 3, 1916, and was tried December 8, 1916, findings of fact were waived, and a judgment was entered therein to the effect that the Marshalls owed Daniel A. McColgan on account of the above mentioned promissory note for $2455.00, the sum of $4110.01, together with interest on $3949.51 of such sum at the rate of 1% per month from December 6, 1916. It was further adjudged that this amount was secured by the deed of trust and it was ordered that if the amount be not paid a sale of the premises might be had.

A. Action No. 5353 and Judgment Therein Not a Bar to This Proceeding.

It is alleged in the answer herein that the action prosecuted by the Marshalls, was prosecuted by them

> "as trustees and agents of and for the benefit of said Frederick V. Lineker and Norvena E. Lineker, and said Frederick V. Lineker and said Norvena V. Lineker were privies to said action and judgment and are and each of them is barred and estopped by said judgment so given, made and entered in said action, and numbered 5353, from maintaining this action against any of the defendants herein and especially against the defendants, Daniel A. McColgan and R. McColgan, and Eustace Cullinan, and in particular are barred and estopped by said judgment from maintaining or asserting in this suit or elsewhere that the sum specified

> in said judgment was not so due, owing and unpaid to Daniel A. McColgan at the time of the rendition of said judgment and on the 22nd day of January, 1917, at the time of said sale." (Tr. 3964, p. 60.)

Exhibit I, consisting of the judgment roll in this action reveals, however, that neither of these plaintiffs were parties to that action, and it also utterly fails to show that the Linekers had notice thereof, so that they could in any sense of the word be bound by the judgment. The above quoted portion of the answer to the effect that the Linekers "were privies to said action and judgment" is of course a mere conclusion of the pleaders.

It further appears that this action was commenced long after action No. 5344, in which, as will hereafter appear, Lineker was endeavoring to prevent the very sale which in action No. 5353 the court ordered might be had.

As already noted, the action was commenced by the alleged agent and trustee of F. V. Lineker and Norvena Lineker on December 3rd, tried on December 8th, and had for its object the defeating of the very purpose of the institution by Lineker himself of action No. 5433. It certainly requires no argument to show that an action thus begun by an alleged trustee for Lineker, which was disposed of in five days, and during the pendency of an action by Lineker himself, to secure relief diametrically opposed to that granted in No. 5353, was not an

action to which Lineker was privy and was not an action brought by his alleged trustee for his benefit and was not one in which a judgment could be rendered which would be conclusive upon either of the Linekers. Neither do we hesitate to say that these facts are amply sufficient to brand that action as having been fraudulent and collusive to a degree.

B. Effect of Action No. 5353 and of Judgment Therein Are Not Involved on This Appeal.

It appears from the record that Judge Rudkin in deciding the plea of *res judicata,* did not take cognizance of action No. 5353, but rested his decision solely and exclusively upon the conclusion that the judgment in action No. 5433 constituted a bar. (Tr. pp. 29, 33.) No doubt, he fully appreciated the effect of the facts above stated rendering the judgment in action No. 5353 inapplicable, and of no effect so far as the plea of *res judicata* is concerned. Hence we need give no further attention to this branch of the case.

III.

NATURE AND EFFECT OF SUPERIOR COURT ACTION NO. 5344.

A. Nature and Content of Complaint in Action No. 5344.

The real and vital question presented by this appeal arises in connection with the determination of the District Court that the judgment of the

Superior Court of Stanislaus County in the action numbered 5344 constitutes a prior adjudication of the cause of action in this suit and a bar to the prosecution thereof. It is necessary, therefore, to examine the judgment roll and the evidence in action No. 5344 with care and particularity.

To the amended bill of complaint herein, the defendants, Daniel A. McColgan, R. McColgan, and Eustace Cullinan pleaded as fourth special defense, the pendency of this action, No. 5344. As above stated, when this cause here under review came on for hearing before the United States District Court, the judgment in action No. 5344, which had been appealed from had become final through a judgment of affirmance rendered by the District Court of Appeal of the State of California for the Third Appellate District. To support their answer in this behalf, the last named defendants introduced in evidence the judgment roll (Exh. A), the remittitur from the District Court of Appeal (Exh. B), the order of the State Supreme Court transferring the cause to the District Court of Appeal for decision (Exh. C), copy of appellants' points and authorities filed in the District Court of Appeal (Exh. D), a copy of the bill of exceptions (Exh. E), a copy of the brief filed in the Superior Court on submission of the cause (Exhs. F, G, and H), and a copy of their proposed supplemental answer (Exh. J).

It will at once be observed that the only parties to that action were Frederick V. Lineker as plain-

tiff, and Daniel A. McColgan, and R. McColgan and Eustace Cullinan (as trustees), as defendants. R. S. Marshall and Olive H. Marshall, his wife (appellees here) were named as defendants but the action was by consent of the plaintiff, dismissed as to them before trial. Neither Norvena Lineker (now deceased, and whose personal representative is one of the appellants here), nor the appellees E. C. Peck, T. R. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Co. were parties.

The complaint (contained in Exh. A) states substantially the following facts:

The ownership by Norvena Lineker of the property in question; her marriage to Fred V. Lineker on September 22, 1912; and her conveyance of that property to her husband on August 18, 1923. No mention is made of the existence or absence of any consideration for this conveyance. That at the time the plaintiff acquired the property it was subject to the deed of trust of June 20, 1910, already referred to. (Exh. A, p. 3.)

That notice of the sale of said property under the deed of trust was given and after various continuances or postponements of the date of sale, it was on September 2, 1914, sold by R. McColgan to R. S. Marshall. (Exh. A, p. 3.)

That after notice of sale had been given, and prior to the actual sale, it was agreed between Daniel A. McColgan and the plaintiff that the latter

should purchase the property at the sale for a sum of money sufficient to cover all sums then due Daniel A. McColgan under the deed of trust. That the plaintiff at that time demanded a statement of the amount so due which was refused him by Daniel A. McColgan, who nevertheless informed the plaintiff that $10,000.00 would be a sufficient amount to cover all his demands, together with certain other alleged liens subsisting against the said property but not secured by the deed of trust. That it was then agreed that plaintiff would bid $10,000.00 and that the difference between this sum and the amount of all legitimate claims of Daniel A. McColgan would be held by McColgan for the purpose of paying off any other liens which might be judicially determined to be valid and subisting liens upon the property, and *upon the further understanding that Daniel A. McColgan would account to the plaintiff for all moneys thus coming into his hands.* (Exh. A, p. 4.)

That at the time of the agreement last mentioned, McColgan knew that Lineker did not have $10,000.00 but that Annie Connors had agreed to lend him $13,000.00 to be secured by promissory note and deed of trust. (Exh. A, p. 5.)

That on June 11, 1913, one J. A. Williams recovered a judgment against Norvena Lineker for $1300.00; that he caused a levy of a writ of execution to be made upon the real property in question, that a sale was thereafter held and that one Crit-

tendon purchased and was given a certificate of sale by the sheriff; *that thereafter Daniel A. McColgan agreed with the plaintiff that he would purchase such certificate from Crittendon, for the use and benefit of and as trustee and agent for F. V. Lineker,* and would repay himself for any expenditure thus made from the difference between the sum which should be paid for the property on the sale under the deed of trust and the amount actually due McColgan under that instrument. (Exh. A, p. 7.)

That on July 15, 1914, Daniel A. McColgan, *in accordance with this agreement and understanding,* purchased the certificate from Crittendon, and on September 2, 1914, received a deed from the sheriff in the usual manner. (Exh. A, p. 9.)

That after the agreement above mentioned made with McColgan and prior to the sale, R. S. Marshall entered into an agreement to attend at the sale and bid $15,455.00 for the property, and thereafter on behalf of the plaintiff, to execute a promissory note to Annie Connors, secured by a first deed of trust on the premises, and a promissory note to D. A. McColgan, for $2455.00 secured by a second deed of trust. (Exh. A, p. 10.)

It is alleged that this promissory note for $2455.00 was made and executed and delivered to Daniel A. McColgan for the purpose of protecting him in any payment which he might make to discharge liens and encumbrances upon the property other than

those, payment of which was secured by the original deed of trust given June 20, 1910. (Exh. A, p. 6.)

That Marshall bid $14,000.00 for the property, paid that sum to R. McColgan as trustee and received a conveyance. Immediately thereafter Marshall and his wife executed their note for $13,000.00 to Annie Connors, secured it by a deed of trust as agreed, and also delivered their promissory note for $2455.00 secured by a second deed of trust to Daniel A. McColgan. (Exh. A, pp. 11-14.)

All negotiations and dealing had with Annie Connors with respect to her loan of $13,000.00 and with McColgan with respect to the promissory note of $2455.00, were had by the plaintiff and were not participated in in any manner by Marshall or his wife. (Exh. A, p. 14.)

It is alleged that all the various agreements, negotiations and understanding had between the plaintiff and Marshall were fully known to the McColgans, that they knew that they had been had and taken for the benefit and use of the plaintiff. (Exh. A, p. 15.)

It is then alleged that Daniel A. McColgan had requested Reginald McColgan and Eustace Cullinan, as trustees, to sell the property under the deed of trust for $2455.00, and that they threatened so to do. That an accounting had been demanded of McColgan, which he refused to make, and that out of the sum of $14,000.00 received by Daniel A. McColgan from the trustees, which $14,000.00 was the

sum bid by Marshall and paid to Reginald McColgan as trustee, had not all been expended by Daniel A. McColgan in paying the amount due himself or any other lien or liens against the property, but that on the contrary there was then remaining in his hands in excess of $2455.00 or more than sufficient to satisfy the promissory note secured by the second deed of trust. (Exh. A, p. 15.)

The prayer of the complaint was for an order and decree enjoining R. McColgan and Eustace Cullinan as trustees, from causing a sale to be made under the deed of trust, and further, that Daniel A. McColgan be required to give an accounting of all moneys which had come into his hands from or on behalf of the plaintiff. (Exh. A, p. 18.)

B. Nature and Content of Answer in Action No. 5344.

The answer of the defendants in that case, so far as material here, was a specific denial of all the material allegations of the complaint. (Exh. A, pp. 20-43.)

C. Nature and Scope of Finding and Judgment in Action 5344.

The cause was tried before the Superior Court, and judgment entered on behalf of the defendants. From that judgment an appeal was taken to the Supreme Court of the State of California, which transferred the cause to the District Court of Appeal, Third Appellate District, for decision, and the last mentioned court affirmed the judgment of the lower court.

The findings of fact in this action No. 5344 were very broad and were evidently drawn on behalf of the defendants in a very clearly apparent effort to protect them from every conceivable kind of future attack in connection with their dealings with the property. The facts were found in accordance with the allegations of the complaint relating to Norvena Lineker's ownership of the property, her marriage, her conveyance thereof to Frederick V. Lineker by deed of gift, subject to the deed of trust to R. McColgan of June 20, 1910, the obtaining of the judgment by Williams, the levy of the writ of execution thereunder, the sale to Crittendon, the issuance of the certificate of sale to him, his transfer thereof to Daniel A. McColgan and the issuance of the sheriff's deed to the latter on September 2, 1914. (Exh. A, pp. 50-55.)

In paragraph VI (Tr. 3964, p. 122) of the findings, it is elaborately found that Daniel A. McColgan, contrary to the allegations of the complaint, purchased the certificate of sale to Crittendon from the latter for McColgan's own use and benefit and that he later received the sheriff's deed for his own use and benefit. That he had never entered into any agreement with the plaintiff to purchase for the benefit of the plaintiff or for any one other than McColgan himself. (Exh. A, pp. 55-57; pp. 58, 59.)

It is found in paragraph VII that the sale under the deed of trust of June 20, 1910, took place on September 2, 1914, but

> "that said sale was not made pursuant to any agreement between said plaintiff and said defendant Daniel A. McColgan whether set forth in complaint of plaintiff herein or otherwise." (Exh. A, p. 57.)

In paragraph IX appears a lengthy finding to the general effect that the note for $2455.00 was executed by the Marshalls in consideration of a loan of $2455.00 to Lineker, evidently in an attempt to foreclose this appellant from ever claiming in the future, as he claims in this action, that this last mentioned note was given without any valid consideration therefor whatsoever. This finding as we shall show was wholly without the issues, unnecessary to the decision and hence not *res judicata*. (Exh. A, p. 60.)

It is further found in paragraph X that execution of this note for $2455.00

> "was intended by said Fred V. Lineker and by said Daniel A. McColgan to be and was in fact, an account stated between said Fred V. Lineker and Daniel A. McColgan, and was intended to be and was in fact, a final accounting between said Fred V. Lineker and said Daniel A. McColgan of all debts and financial transactions between them up to the time of the execution of said promissory note * * *." (Exh. A, p. 60.)

It was further found that the facts alleged in the complaint with respect to the arrangements made between the plaintiff and Daniel A. McColgan for

the payment of any alleged liens subsisting against the real property were untrue.

As conclusions of law from these facts, it was determined:

(1) That Daniel A. McColgan was the owner of the real property at the time of the sale on September 2, 1914.

(2) That by virtue of his purchase of the Crittendon certificate and the issuance of the sheriff's deed to him pursuant thereto. That Daniel A. McColgan was entitled to any and all proceeds of the sale held on September 2, 1914, and that said Fred V. Lineker had no interest therein.

(3) That there was an account stated in accordance with the findings and that the plaintiff was not entitled to any judgment "against any of said defendants herein for an accounting of the proceeds of said sale of said real property * * *." (Exh. A, p. 62.)

D. The Points of Fact and Law Actually in Issue in Action 5344 and in the District Court of Appeals.

In what has been above said, we have endeavored to give as concise a statement and resumé of the *pleadings* in this action No. 5344 as is consistent with the necessity that in a case such as this that a full and fair statement is required, in order to enable the court to arrive at a correct conclusion.

We admit at once that a consideration of these pleadings as above outlined would tend to indicate

that a number of the material matters set forth in the amended bill of complaint herein were litigated and passed upon by the Superior Court in action No. 5344, and we as readily concede that the opinion of the District Court of Appeal in affirming the judgment of the Superior Court tends to support such a conclusion. That opinion sustains the lower court in its findings that *there was no oral agreement* between Daniel A. McColgan and the plaintiff to the effect that he would purchase the Crittendon certificate for the benefit of the plaintiff; it purports to sustain the lower court in its findings that there was an account stated and it also holds that there was no fiduciary relationship existing between Daniel A. McColgan and the plaintiff which would prevent him from purchasing the Crittendon certificate and taking the sheriff's deed in hostility to the plaintiff by reason of any confidential relationship existing between them; and lastly, that Daniel A. McColgan, by "acquiring plaintiff's equity of redemption by Sheriff's deed" became entitled to "receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled."

The appellants here contend that an examination of all the evidence submitted in support of the plea of *res judicata* shows that the lower court, in making its findings went far afield beyond the

issues raised by the pleadings and beyond the issues on which evidence was presented at the trial.

They also contend that such an examination reveals that the opinion of the District Court fell into the same error of passing upon questions not in issue. (Exh. B.)

It is the appellant's contention that *the only issue actually tried and litigated* in the Superior Court in action No. 5433 was whether Daniel A. McColgan had entered into an oral agreement with the plaintiff to purchase the Crittendon certificate of sale for the benefit of Lineker himself and that none of the rights of Norvena Lineker were involved in that action.

An examination of the testimony presented to the lower court as revealed by the bill of exceptions on the appeal from its judgment (Exhibit E) shows very clearly that notwithstanding the allegations of the complaint and the answer therein, the real and only controversy revolved about this oral agreement, the existence of which was alleged by the plaintiff and denied by the defendant.

Practically at the inception of the trial, the attorney for the plaintiff in that action (appellant here) stated to the court as follows:

> "We might state here, if your Honor please, in view of the turn this case has now taken, that these questions as to the purchase of this property by the Marshalls, and matters relative to the second deed of trust, $2445.00 deed of trust, might be immaterial to—irrelevant to

> our present action, but there is nothing in there about it being part of the agreement, but, however, it is rather immaterial, I think. The crux of the matter is getting back to the agreement had between Daniel A. McColgan and the plaintiff as to the sale." (Exh. E, p. 101.)

The complaint set up an oral contract and alleged the breach of it, and some other matters which were pleaded by way of inducement and for the purpose of showing that the plaintiff should have the threatened sale of the land postponed until the rights of the parties under that *alleged oral agreement* could be determined. But whether or not such other matters may be considered as having been pleaded by way of inducement, still the abandonment by the attorney of the plaintiff of all matters in the complaint concerning the sale of the land to Marshall and all questions concerning the rights and liabilities of all parties to the deed of trust for $2455.00 certainly had the effect of limiting the matter to be determined by the Superior Court to those matters strictly in issue under the pleadings less all of such matters as were abandoned by the attorney and thereby eliminated from the case.

In this connection, it may again be called to the court's attention that the action had already been dismissed as against the defendants, R. S. Marshall and wife, and the trial actually proceeded against Reginald McColgan, Daniel A. McColgan and Eustace Cullinan only.

That Daniel A. McColgan, Reginald McColgan and Eustace Cullinan, respondents on the appeal from the decision of the Superior Court (appellees here) similarly regarded the issues before the Superior Court as having narrowed down to the question of the existence or nonexistence of the oral agreement, appears very clearly from the following extracts from their brief on appeal to the District Court of Appeal (Complainants' Exhibit 3):

Page 6:

> "Lineker in his complaint (Paragraph V, Tr. Fols. 19 to 31) alleged an oral agreement by McColgan to purchase the Crittendon title for Lineker's benefit, and that oral contract is the whole basis of the cause of action pleaded by Lineker."

Page 13:

> "Lineker in his complaint did not plead the terms of the first deed of trust and did not allege that under the terms of that deed of trust, as he contends on this appeal, that McColgan was prohibited from acquiring the Crittendon certificate for McColgan's use or benefit."

Page 15:

> "Most of the evidence in the case turns upon the issue whether McColgan agreed orally to buy the Crittendon certificate for Lineker's benefit."

Pages 15 and 16:

> "Respecting the execution of the promissory note for $2455, plaintiff alleges in his complaint

(Tr. fols. 17-19) that prior to the sale under the first deed of trust it was agreed between Lineker and McColgan that for the purpose of securing McColgan, in case he should be made to pay any of the liens alleged to be subsisting against the real property and which were not secured by the first deed of trust, Lineker would execute to McColgan his note for $2455 and the second deed of trust.

The trial court found that no such agreement was made respecting the $2455 note (Finding XII, Tr. fols. 267-270) * * *."

Page 43:

"We have seen that Lineker did not plead the language of the deed of trust as the basis of his cause of action, but relied in his complaint exclusively on McColgan's alleged oral agreement to buy the Crittendon certificate for Lineker's benefit. (See Par. V of the complaint, Tr. fols. 19 to 31.)

* * * It is obvious, that if a new trial were to be granted in this case, plaintiff could not prove the alleged agreement, except by oral evidence."

Page 44:

"But Lineker contends that McColgan took the legal title to the land as trustee for him by reason of the oral promise alleged in the complaint. That is the real issue presented by the pleadings and the theory on which the case was tried. The complaint alleges that this oral agreement was made prior to the purchase of the Crittendon certificate and also alleges that McColgan's agreement 'to repay himself for the monies thus expended by him out of the monies coming into his hands from said trustee at said trustee's sale', and that McColgan there-

after purchased the Crittendon certificate in accordance with that oral agreement."

Page 60:

"In the first place, the question whether McColgan was prohibited by the deed of trust from acquiring the Crittendon certificate for his own benefit is not an issue in this case. The terms of the deed of trust were not pleaded. Lineker in his complaint, relied solely and exclusively on the oral promise which he alleges McColgan to have made to purchase the Crittendon title for Lineker's benefit (see the complaint, paragraph V, Tr. fols. 19 to 30). On that alleged oral agreement Lineker's entire cause of action rests."

Page 11:

"No remedy is sought against the defendants R. McColgan and Eustace Cullinan except an injunction restraining the sale under the second deed of trust, in which they were trustees, a sale which has already taken place, and as they are not involved in the accounting matter, it seems so obvious as to require no argument that as to them the judgment must be affirmed. The real parties on this appeal are Lineker and Daniel A. McColgan."

That such was the view of the appellants in their action up to the very time that the cause was submitted to the District Court of Appeal for its decision, appears from the oral argument of Mr. Harwood, who appeared on their behalf, (which oral argument was subsequently printed and filed with that court and is Complainants' Exhibit 1

herein), concerning the issues of the case. He states in his argument as follows:

Page 5:

> "The purpose of this action was this: It was alleged in the complaint, and *this is the gist of the complaint, that when D. A. McColgan bought the Crittendon certificate of sale from Crittendon on the 15th day of July, 1914, that he did so under an oral agreement with plaintiff that he would buy it for the benefit of Fred Lineker.* Certain testimony was introduced by Mr. L. L. Dennett, an attorney of Modesto, to that effect. Mr. Dennett's testimony, I think your Honors will see, is very indefinite as to whether there was an understanding, and as to the terms of the alleged understanding." (Page 5.)

Page 6:

> "The transactions themselves which took place on September 2, 1914, are absolutely inconsistent with the plaintiff's claim in the case that there was any such oral agreement at all."

Page 14:

> "On this appeal for the first time the contention is advanced in the brief for appellant that under the deed of trust Daniel A. McColgan could not purchase the certificate of sale for his own benefit. That contention was not made in the trial court, could not have been made under the issues in the case and is entirely outside of the issues."

Page 19:

> "That the contention as to whether or not this clause of the deed of trust prohibited Daniel A. McColgan from buying for his own benefit the certificate of sale is not material,

since it is without the issues in this case, and that point is fully made in the respondent's brief. *The complaint in this case is based on the theory that Daniel A. McColgan purchased the certificate of sale for the benefit of plaintiff and that he would be reimbursed therefor.* Mr. Dennett gave testimony regarding this alleged oral agreement. Each time it was somewhat different, but that was the effect of the alleged oral agreement, which was denied by Mr. McColgan. There is no allegation in the complaint to the effect that the purchase of the certificate of sale was in pursuance of any term or provision of the deed of trust. The deed of trust is not set forth in the complaint. This contention was never made in the trial court."

Page 20:

"No legal question arose in the trial court or was presented by the pleadings in the case as to whether or not Daniel A. McColgan had the right to purchase the certificate of sale under the terms of the deed of trust. Certainly the deed of trust itself doesn't support the testimony as to the alleged oral agreement. *Mr. Dennett testified to an oral agreement.* The deed of trust is not evidence in support of that claim. *That was the only issue in the case.* The deed of trust was not evidence in support of that alleged oral agreement and the deed of trust was not part of the complaint."

Page 21:

"Of course it was incumbent upon the plaintiff to make out his case. If the plaintiff wished to claim that McColgan could not, under the terms of the deed of trust, purchase the Crittendon certificate of sale for his own benefit, he should have alleged the terms of the deed of trust in his complaint and stated that Mc-

> Colgan bought this certificate pursuant to the deed of trust. The complaint alleges McColgan bought the sheriff's certificate of sale from Crittendon and that he did so *under an oral agreement, and that is the issue presented by the complaint.*"

It is admitted to be a fact that all parties to this action in their briefs filed in the lower court, as well as in their briefs filed with the District Court of Appeal, did discuss at considerable length the proposition that under the terms of the deed of trust, Daniel A. McColgan was prohibited by reason of the relationship existing between himself and the Linekers from purchasing the Crittendon certificate of sale in hostility to them, or otherwise than as their trustee, voluntary or involuntary as the case might be. Be that as it may, it remains incontrovertible that *the only question of fact actually litigated was that concerning the existence of the alleged oral agreement* and that the only question of law was the one just referred to.

The relief sought in action No. 5344 narrowed down at the trial as it was, was solely and only an order restraining R. McColgan and Eustace Cullinan from making a sale under the deed of trust for $2455.00, on the ground that Frederick V. Lineker and not Daniel A. McColgan was the owner thereof, a sale which as a result of action No. 5353 to which neither of the Linekers were parties and by which they were not bound, had taken place long before the conclusion of action No. 5344.

In this action, on the other hand, the appellants seek to have it declared that the McColgans and Eustace Cullinan are legally obligated to account to these appellants for the excess of the sum of $14,000.00 received by them at the sale under the deed of trust of June 20, 1919, in excess of the moneys actually due Daniel A. McColgan thereunder at the time of such sale; that the second deed of trust, for $2455.00, was given without consideration and is, therefore, null and void; that all transfers of the property subsequent to the sale under said deed of trust are null and void, because without consideration and in fraud of the rights of these appellants; that the plaintiffs be declared the lawful owners of the property; and that an account be taken of all monies received by Marshall as trustee for Frederick V. Lineker.

It is apparent, therefore, that the issues upon which action No. 5344 was actually tried, and the relief sought therein, differ vitally and essentially from the facts pleaded and the relief sought and the issues made in and by the amended bill of complaint herein and the answers.

In the light of the foregoing facts, all of which are established by documentary evidence, appellants herein make the following contentions with respect to the effect of the judgment in action No. 5433:

It does not constitute a bar to the maintenance of this action against either of the McColgans or

against Eustace Cullinan because the only question of fact involved therein was the existence or the non-existence of the alleged oral agreement of Daniel A. McColgan to purchase the Crittendon certificate for the benefit of Frederick V. Lineker personally, a question not even remotely in issue under the pleadings herein.

However broad the issues may have been as framed by the pleadings in that action, they were narrowed down by the attorney for the plaintiff therein by withdrawing all other contentions. We shall hereafter cite authorities demonstrating that where issues tendered by pleadings have been thus narrowed down in the action, the judgment therein will be an estoppel or bar in any subsequent proceedings with respect to the issues remaining in the case and to those only.

Appellants maintain upon the same ground that the determination by the District Court of Appeal in affirming the judgment of the Superior Court went beyond and outside of the issues in purporting to hold that under the terms of the deed of trust Daniel A. McColgan had a right to purchase the Crittendon certificate in hostility to the defendant Frederick V. Lineker. As has been shown, the respondents upon that appeal (Daniel A. McColgan, R. McColgan and Eustace Cullinan) steadfastly maintained what we assert to be the fact, namely, that the only issue in action No. 5433 was

the question as to the existence or non-existence of the oral agreement referred to.

It is obvious of course that in the amended bill of complaint herein, no reference whatever is made to this oral agreement and it forms no part of the alleged ground of recovery upon which these appellants seek a decree. Furthermore, even if it be conceded, for the sake of argument, that the right of Daniel A. McColgan to purchase the Crittendon certificate in hostility to Frederick V. Lineker has passed into the realm of adjudicated issues, it still remains the fact that McColgan's right to purchase that certificate in hostility to *Norvena Lineker* has never been passed upon.

The gist of the bill of complaint herein on the other hand, is found in the allegations therein contained to the effect

(a) That prior to the sale of September, 2, 1914, the McColgans "unlawfully and fraudulently claimed that they were entitled under said deed of trust (of June 20, 1910) to a sum greatly in excess" of the amount actually due them;

(b) That they claimed in excess of $10,000.00;

(c) That they fraudulently threatened to sell under the deed of trust if Frederick V. Lineker failed to pay them the sum of $10,000.00;

(d) That Daniel A. McColgan and R. McColgan procured Frederick V. Lineker to cause a bid of $14,000.00 to be made at the sale upon the fraudulent representation that they, the McColgans, would re-

pay to him and account to him for all monies received by them in excess of what was actually due the McColgans or either of them under the deed of trust;

(e) And that after the sale R. S. Marshall and wife wrongfully and unlawfully and in fraud of the appellants' rights made or attempted to make a certain deed of trust to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan in the sum of $2455.00 or thereabouts, which said deed of trust was entirely without consideration.

Certainly any reasonably close examination of the judgment roll and of the bill of exceptions in action No. 5344 will reveal that the existence or non-existence of a consideration for the deed of trust in the sum of $2455.00 was at no time in issue.

It is true that Finding X (Exhibit A, page 87) is to the effect that there was account stated between Frederick V. Lineker and Daniel A. McColgan on September 2, 1914, whereby and wherefrom it appears that the sum of $2455.00 was due from Lineker to McColgan. Perhaps nothing in the findings better illustrates our contention that the Superior Court travelled far afield and clearly outside of the actual issues in making its findings and giving its judgment. The pleadings in that case will be searched in vain for any reference or suggestion relating to any account stated. Equally without result will the bill of exceptions be searched for anything which would possibly justify such a conclusion. How the Superior Court could pos-

sibly have made such a finding when counsel for the plaintiff in that case at the time of trial specifically and clearly, in the language already quoted, withdrew and abandoned all matters in the complaint concerning the rights and liabilities of any of the parties with respect to or pertaining to the said deed of trust for $2455.00 thereby eliminating them from the case, is quite beyond comprehension. Certainly the decisions which we cite clearly prevent that finding, the judgment founded thereon and the affirmance thereof from being considered a prior adjudication of the question of whether there was any consideration for the $2455.00 note and deed of trust.

Appellants further contend that in addition to the reasons already given, the judgment in action No. 5344 could not possibly be a bar as against Frederick V. Lineker as administrator of the estate of Norvena Lineker, for the reason that Norvena Lineker was not in person or by personal representative a party to that action, and judgment therein does not purport to bind her.

Furthermore the issues raised by the amended bill of complaint herein and the first special defense thereto of the McColgans and Eustace Cullinan (Tr. 3964, p. 42) will, in the event of a trial upon the merits, inevitably raise and present the legal issue as to whether Crittendon ever acquired any interest or title by virtue of the levy of his writ of execution in the land, title to which had previ-

ously been conveyed out of Norvena Lineker to R. McColgan and Eustace Cullinan.

In other words, the trial court would have to determine whether a writ of execution against the grantor under a deed of trust, who has conveyed his entire interest and estate to trustees, acquires any interest or estate in the land so that after a sheriff's sale upon execution in the manner provided for a sale, not of personal property, but of real property, becomes entitled to any surplus of the price received upon sale of the property under the deed of trust. It cannot be contended that any such issue of law was presented to or decided, either by the Superior Court or by the District Court of Appeal. And yet, as we will show, it was legally impossible for Daniel A. McColgan to have acquired any interest or any estate whatsoever in the land by reason of his purchase of the Crittendon judgment and certificate of sale which could have survived the sale by the trustees under the original deed of trust and which could have entitled him to such surplus.

IV.

THE BILL OF COMPLAINT WAS IMPROPERLY DISMISSED ON THE GROUND OF LACK OF EQUITY.

It seems highly probable that the decree of dismissal, in so far as the dismissal was ordered for lack of equity, was inadvertently made, unless per-

chance it was predicated upon the court's conclusion that the action was barred.

At no time during the proceedings in this cause was it ever contended or suggested that the bill lacked equity. The point was apparently never raised nor mentioned at any time prior to the signing of the decree of dismissal. No motion to dismiss was interposed by any of the appellants on any ground whatever. On the contrary, all immediately answered the bill.

Appellants are aware of the rule that a court may of its own motion dismiss a bill which obviously and clearly fails to state a cause of action. But this certainly is not such a case. The allegations of the bill which must be taken as true in considering the propriety of the order of dismissal certain state facts which if proven would entitle the appellants to relief. That this is the case is so patent from the foregoing recital of the contents of the bill, that it seems utterly unnecessary again to recite the statements of fraud, unfair dealing, overreaching, abuses of confidence, and partial or entire lack of consideration for the various deeds of trust and the other conveyances.

It is sufficient to say that the decree of dismissal cannot be sustained on the theory that it lacks equity.

V.

THE LAW.

A. It was Legally Impossible For Daniel A. McColgan to Have Acquired an Equity of Redemption or any Other Estate or Interest in the Land by Reason of His Purchase of the Crittenden Certificate of Sale That Survived the Sale by the Trustee Under the Original Deed of Trust.

The first thing to be particularly noted with relation to our contention on this point, is the difference in California between a deed of trust and a mortgage. Until the case of

Weber v. McCleverty, 149 Cal. 316,

was decided by the Supreme Court of California, there was much confusion in the decisions as to the legal effect of such deed of trust, the impression generally prevailing theretofore being that a deed of trust was practically and in effect a mortgage with a power of sale. The case of

Weber v. McCleverty

finally settled the law in California, and the rule there announced is now a rule of property in California; and this rule in effect is: when a deed of trust covering land is given to secure the repayment of money, the trustee named in the deed thereby acquires the absolute title to the land owned by the trustor at the time of the making of the deed of trust, so far as is necessary to enable him to convey such land to the purchaser at the trustee's sale free of all right, title, interest or estate of the trustor or anyone claiming under or through him; that after the making of such trust deed it is legally

impossible for the trustor by any act of his voluntary or involuntary, to cause a lien or encumbrance to be put or cast upon the property covered by the deed of trust, which is not completely wiped out by the sale made by the trustee in pursuance of the powers to sell given him by the deed of trust, and when such sale is made by the trustee, the purchaser acquires the full legal and equitable title which was formerly owner by the trustor at the date of and immediately prior to the making of the deed of trust, unaffected by any act of the trustor subsequent to the date of the deed of trust and unaffected by any judgments against the trustor or by any contingent judgment liens, subsequent in point of time to the deed of trust.

The leading case on the subject in California and the one which settles the law is the above cited case of

Weber v. McCleverty,

wherein the court reviews the former cases on the point and says:

> "In legal effect, a deed of trust does not create a lien or encumbrance on the land, but conveys the legal title to the trustee. In order to execute the trust he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the

purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt. * * * The trustee holds title to the entire estate for the purpose of conveying it when required in execution of the trust, and he cannot at the same time hold as trustee a lien on the same estate, for that would necessarily imply that the title to the estate was not vested in him. The estate of the trustee in the land is consequently not a lien thereon, even as that term is defined in section 1180 of the Code of Civil Procedure, conceding it to be in force. It is not a charge on the land, but the very land itself.

A mortgage or other encumbrance on land does not transfer the title, but leaves it vested in the mortgagor or owner. A homestead attaches to whatever estate in the land may be vested in one or both of the spouses. Consequently, when declared on land previously mortgaged or encumbered, it attaches to the legal title, which then becomes the homestead interest, and the mortgage or encumbrance may properly be said to be a subsisting lien or encumbrance on the homestead and as such it would be governed by section 1475. But it is not so with a deed of trust. It transfers the legal title to the trustee, and, as the homestead applies only to the title vested in one or both of the spouses, and does not affect titles vested in third persons, it follows, that the legal title thus vested in the trustee forms no part of a subsequently declared homestead, and that the deed of trust, or the title of the trustee, is not a subsisting lien or encumbrance on the homestead interest.

The decisions of this court, with one exception, are in harmony with these views. In Sacramento Bank v. Alcorn, 121 Cal. 379 (53 Pac. 813), speaking of the character of a deed of trust, the court says: 'Under the decisions, it is practically, though not in legal effect, little more than a mortgage with power to convey. The legal title passes, but it conveys no right of possession, and the trustor may, remain in possession, and until the execution of the trust, may maintain an action to recover possession. * * * The trustor may file his declaration of homestead and hold the premises as such against his creditors who are not secured by the trust deed. * * * While we may say that the title passes, none of the incidents of ownership attach, except that the trustees are deemed to have such an estate as will enable them to convey.' Similar expressions are found in Tyler v. Currier, 147 Cal. 36, (81 Pac. 310). In Hodgkins v. Wright, 127 Cal. 688 (60 Pac. 431), in speaking of such deeds, and evidently intending to epitomize the above passage from Sacramento Bank v. Alcorn, to which reference is made, the court says: 'In effect, they are mortgages with power to sell.' The statement that they are in effect, or practically, mortgages with power to sell, means only that the practical result of the enforcement of either is the same: that is, the estate held by the mortgagor at the time of the execution of the mortgage, in one case, and that of the trustor at the time of the execution of the deed of trust, in the other case, are by the respective conveyances of the sheriff on foreclosure sale, and of the trustee on trustee's sale, transferred to the respective purchasers at such sales and that in the meantime the mortgagor or trustor, respectively, have the use and enjoyment of the property. All this is true,

and yet the entire estate of the trustor, for the purposes of the trust, must during the intervening period be vested as an estate, and not as a lien, in the trustee, otherwise he could not legally convey it in execution of the trust. The case which seems to hold that a deed of trust is an encumbrance and not an interest in the land is Williams v. Santa Clara Min. Assn., 66 Cal. 200 (5 Pac. 85). The question there arose whether section 1192 of the Code of Civil Procedure requiring any person 'claiming and interest', in land upon which a building was being erected, to give notice that he will not be responsible for the same in order to avoid the enforcement of a lien for the cost of the building against such interest, was applicable to a deed of trust. The court in effect held that, so far as that section is concerned, the estate created by the trust deed should not be deemed an interest in the land, so as to require the trustee to give such notice, and said that the deed should be 'treated' as an encumbrance, and that, the deed having been recorded before the building was begun, it was exempt from the lien by the provisions of section 1186 of the Code of Civil Procedure.

The court merely says that in the application of section 1186 and 1192 of the Code of Civil Procedure a deed of trust should be 'treated' as an encumbrance. This is far from deciding that it is in legal erect an encumbrance; indeed, the context implies an admission that it has no such legal character, and is to be so considered only when, in a court of equity, the ultimate results are to be considered, rather than legal forms and rules. The point received no thorough treatment in the opinion, the code definitions were not mentioned, and although we do not in the least impugn the authority of the decision as a construction of the section of

the code there involved, we do not consider ourselves bound to adopt the doctrine as a general principle, and, in the face of the provisions of the Civil Code above given, apply it also to section 1475 of the Code of Civil Procedure.

The claim or interest of the trustees, not being either a lien or encumbrance on the homestead, and the homestead right being subsequent to the deed in point of time and subordinate to it in all respects, it follows that the conveyance of the trustee related back to the estate of the trustor at the time he executed the trust deed, and transferred to the purchaser the entire right, title, interest, and estate in the land then vested in the trustor, thereby completely extinguishing the homestead."

In

Athern v. Ryan, 154 Cal. 554-6,

the court said:

"the principle on which that case (Weber v. McCleverty, 149 Cal. 316), rests is that a deed of trust is not a lien or encumbrance" etc.

In

Bryant v. Hobart, 44 Cal. App. 315-317,

the court by Kerrigan, J., says:

"We think the point has been put at rest by the case of Weber v. McCleverty, 149 Cal. 316 (86 Pac. 706); McLeod v. Moran, 153 Cal. 97 (94 Pac. 604), and Athern v. Ryan, 154 Cal. 554 (98 Pac. 390). The effect of such a deed, says the court in the first of these cases, is to convey the legal title to the trustee, who is thereby vested with the absolute legal title to the premises so far as is necessary to enable

> him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustors, or anyone claiming under or through them. (2) Under these authorities we have no doubt that such a deed of trust transfers for the purpose of the trust all possible claims of the trustors in the property conveyed, including a claim of homestead, and vests in the trustee the absolute legal title to the entire estate held by the trustors at the time of the execution of the trust deed, and that the title must remain in the trustee for that purpose until the trust is either executed through a sale upon default in the payment of the debt secured by the deed of trust, or is terminated by the payment of such debt or other method provided by law. (3) The declaration of homestead in the case at bar was made prior to the execution of the trust deed, but it is immaterial whether it was declared prior or subsequent thereto." *(Athern v. Ryan,* supra.)

Now if Crittendon had held his certificate of sale, and his judgment until the trustees' sale on September 2, 1914, any so called lien he might have acquired would have been foreclosed and his interest wiped out by that trustee's sale.

The fact that Crittendon assigned his certificate of sale and his rights thereunder to Daniel A. McColgan, gave no greater virtue to that certificate or the so called lien thereof than if Crittendon had retained it himself. Any interest tentative or conditional in these lands that Daniel A. McColgan acquired by the purchase of the Crittendon certificate and the later sheriff's deed was foreclosed and

wiped out by the trustees' sale on September 2, 1914, to R. S. Marshall.

Therefore, it would seem to follow as a matter of law that Daniel A. McColgan did not acquire an equity of redemption in these lands by that purchase. How then could the lower court be correct in stating in this opinion as follows:

> "First, that under the execution sale and sheriff's deed, McColgan acquired the equity of redemption in the lands in controversy, in his own right, and became entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed, above the indebtedness secured thereby, to which the plaintiff would otherwise have been entitled." (Tr. p. 30.)

It follows necessarily from the decisions cited and quoted from that Norvena Lineker, after she executed the deed of trust of June 20, 1910, had no *title or estate,* either legal or equitable in the premises conveyed. All that remained in her were certain purely contractual rights, to-wit:

a. To have reconveyance made to her upon payment of all obligations, performance of which was secured by the deed of trust; and

b. To receive from the trustees after sale, if any, under the deed of trust the surplus of the sale price over and above the amount of her indebtedness to the beneficiary under the deed of trust or to the trustee as such.

Hence the purported levy *upon the land* of the writ of execution under the judgment obtained by Williams against Norvena Lineker, could not in the very nature of things have created a lien upon the land, as against her or at all. Her contractual rights above enumerated obviously could not possibly be reached by that levy. No other levy was ever made. The only manner in which any surplus after sale under the deed of trust could have been reached would have been by means of a levy made upon the trustee after the funds derived from the sale had come into his hands.

This being the case, the levy of execution, the delivery of the purported sheriff's certificate to Crittendon, and the issuance of the sheriff's certificate to D. A. McColgan, after he purchased Crittendon's certificate, were wholly abortive in so far as it was attempted by means thereof to reach any property or rights of Norvena Lineker.

B. The Modern Doctrine of Res Judicata Prevents the Operation of the Bar in This Case.

It is respectfully submitted that the rigor of the ancient rule of *res judicata* has been greatly relaxed by the more recent decisions of the Supreme Court and the several Circuit Courts of Appeal, also by most of the State Supreme Courts, including the Supreme Court of California.

It is conceded that there has been very little relaxation of the statement of the rule where the

second cause of action is based upon the same cause of action that was tried in a former suit, but the severity of this rule has in fact been greatly modified by confining the estoppel of the judgment in the former suit to *the precise question distinctly put in issue and directly determined.* This point was discussed and the rule definitely settled by the Supreme Court in the recent case of

> *State of Oklahoma v. State of Texas,* 256 U. S. 70 (41 L. Ed. 420),

and the rule stated as follows:

> "The general principle, applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. R. v. United States, 168 U. S. 1, 48, 49; 18 Sup. Ct. 18; 42 L. Ed. 355, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited on page 49 of 168 U. S., on page 27 of 18 Sup. Ct. (42 L. Ed. 355).
>
> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person

> and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Moreover, the recent cases hold that if the first cause of action was brought upon a wrong theory, the plaintiff is now permitted to bring a second action based upon the right theory and be not estopped by reason of the first judgment. The rule on this point was recently declared by the Supreme Court in

Southern Pacific v. Bogert, 250 U. S. 483,

in an excellent opinion wherein it said:

> "And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory because unsupported by facts, should not be permitted to recover on another for which the facts afford ample basis."

If the second suit is not founded on the same identical cause of action as that tried in the first action, the court will analyze the first action very closely to see what was actually and properly at issue, and permit the judgment in the first action to become an estoppel only as to the matters that were strictly within the issue of the first action and properly determined by the court, and will disregard any findings upon facts which were not strictly in issue.

The modern rule on this point was very recently declared by the Supreme Court in

State of Oklahoma v. State of Texas, 256 U. S. 70,

in the following language:

> "But we concede that, in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not res judicata."

Two recent decisions of the Supreme Court of California are to the same effect. In

Williams v. McConald, 180 Cal. 546,

the court said:

> "A judgment in order to operate strictly as a bar to a subsequent action must have gone to the merits of the subsequent action. This is the full extent of the doctrine of such cases as Taylor v. Castle, 42 Cal. 367; South San Bernardino etc. Co. v. San Bernardino Bank, 127 Cal. 245, and Heilig v. Parlin, 134 Cal. 99, cited on behalf of the plaintiff. If, for example, the plaintiff has mistaken his legal remedy or the proper form of action, and judgment goes against him for that reason, the judgment is no bar to a second action rightly brought."

In

Lang v. Lang, 182 Cal. 765-767,

the court said:

> "Upon the first question it is contended by the appellant that the final decree of divorce

> constitutes a conclusive judgment disposing of the community property of the parties to that action, and that such judgment is not subject to attack at the instance of the plaintiff herein. In support of this argument the appellant relies upon the numerous decisions of our appellate courts declaring not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated. This rule, while generally true, is not always applicable literally. (Brown v. Brown, 170 Cal. 1-6.) 'What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. (Concannon v. Smith, 134 Cal. 14-16.) Accordingly it has been held that a finding made by a court of a fact upon which there is no issue in the case before it, and which does not enter into or form the basis of the judgment rendered in the action, is not admissible in another action between the same parties, either as an admission or by way of estoppel. (Bank of Visalia v. Smith, 146 Cal. 398.) As long as matters are not tendered as issues in the action they are not affected by it. (Brown v. Brown, supra.)"

Moreover, another rule of the more liberal modern doctrine now prevailing is, if there be any uncertainty in the record of the former suit as to the precise questions which were actually put in issue and determined, the whole subject matter of the action will be at large and open to a new contention. This rule was declared by the Supreme Court in

Russel v. Place, 94 U. S. 606,

in the following language:

> "But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

See also the very recent case of

Hottelet Co. v. Garden City Co. (C. C. A. 8th, 1922), 285 Fed. 693,

wherein the court, speaking through Sanborn, J., said:

> "Another rule is that where the record is such that there is or may be a material issue, question or matter in the second suit upon a different cause of action which may not have been raised, litigated or decided in the former action, the judgment there in does not constitute an estoppel from litigating that issue, question or matter unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question or matter in dispute was actually and necessarily decided in the former suit."

Since the enactment of the New Equity Rules the tendency of the courts is to postpone decision on all pleas such as *res judicata* until after the

hearing of the facts in the second action. The theory is that the plea of former adjudication usually involves close questions of fact and not merely questions of law.

Boyd v. New York & H. R. Co., 220 Fed. 174.

It is almost impossible to determine in advance of the trial of the second action whether or not the questions of fact in the first action are the same questions of fact to be determined in the second action. Two recent decisions supporting this contention are:

Keown v. Hughes (C. C. A. 1st, 1920), 265 Fed. 527-575,

where the court said:

> "But frequently, perhaps generally, former adjudication involves close questions of fact, and not mere questions of law. Clearly there is not enough in the record before us to justify the attempt of the court below to determine this issue, on a motion to dismiss for want of equity."

In

Graff Furnace Co. v. Scranton Coal Co., (C. C. A. 3rd, 1920), 266 Fed. 798-802,

the court said:

> "The true test of identity of causes of action is the identity of the facts essential to their maintenance."

Another decision which very strongly supports our theory is that of

Cromwell v. County of Sac., 94 U. S. 351.

It appears from the decision in that case that an action had been brought by the assignee of certain coupons attached to bonds issued by the county. In that action judgment was rendered for the defendants and that judgment was affirmed by the United States Supreme Court, which held that the evidence showed that the bonds were fraudulent in their inception and that the plaintiff could not recover inasmuch as he had not affirmatively proved that he paid value therefor.

Thereafter the assignor of the bonds involved in the first action filed another action to recover on some other coupons attached to the same bonds. The defendants pleaded *res judicata* and maintained that the judgment in the earlier action was a bar to the second action. The Supreme Court, however, overruled this contention, saying in the course of its opinion as follows:

> "Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the

> bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a bona fide holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bonds and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had."

It is respectfully submitted, therefore, that this court is bound carefully to examine all the evidence submitted in the plea of *res judicata* herein, and that upon such examination, it must reverse the action of the lower court in sustaining the plea of *res judicata* for the reason that the record discloses clearly that this action is not based upon the same facts or theory and does not seek the same relief as were involved and sought in action No. 5344. Material questions of fact and of law which did not enter into action No. 5344 at all and which indeed

under the pleadings could not have entered into it, are the very foundation of this pending action.

Whatever could possibly be said to controvert our statement, still it cannot be denied that at best, the validity of the plea of *res judicata* presents an extremely close question when viewed from the position of the defendants presenting the plea, and under such circumstances, the plea should not be sustained without a hearing upon the merits. If, after hearing, which will fully reveal all facts, it then appears that the plea is well taken, judgment accordingly may still be rendered without detriment, injury or harm of any kind or character to any of the parties to this action.

Dated, San Francisco,
March 11, 1925.

Respectfully submitted,
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Solicitors for Appellants.